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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

HARRIET TILLMAN et al.,

Defendants and Appellants.

C056509

(Super. Ct. Nos.
04F07992, 05F10859,
05F05934)

In case No. 05F10859, a jury found defendants Harriet Tillman and Taide Munguia guilty of robbery of an inhabited house and assault with a deadly weapon and the jury also found true that one of the principals was armed with a firearm. It also found true Munguia personally used a gun. The trial court found a number of aggravating factors relating to the crimes, and sentenced Tillman to 10 years in prison and Munguia to 16 years in prison.

In cases Nos. 04F07992 and 05F05934, the court found Tillman in violation of probation and sentenced her to two years

in prison for each case to be served concurrently with the sentence in the robbery case.

On appeal, defendants, individually or together, raise the following contentions: (1) there was insufficient evidence to support Tillman's conviction for assault with a deadly weapon; (2) the court erred in refusing to instruct on grand theft as a lesser included offense of robbery; (3) the court erred in conducting a hearing on aggravating factors; (4) the court erred in not awarding presentence credit in Tillman's probation cases; and (5) the court made clerical errors in Tillman's abstract of judgment that need to be amended. Agreeing with the contentions regarding presentence credit and the abstract of judgment, we modify Tillman's judgment and order the abstracts for both defendants modified.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Prosecution

Tillman was married to the victim, K., for three to four years. Their marriage ended in July 2005, but the two still talked and spent time together at K.'s house.

Around 10:30 p.m. on December 9, 2005, Tillman telephoned K. and asked to come over. K. agreed. When Tillman arrived, K. locked the door behind them. The two then "got into a little argument like [they] always d[id]," and K. went back into the bedroom "to get away from the arguing."

While K. was in the back of the house, Tillman called to him from the hallway bathroom, asking for toilet paper. As K.

entered the bathroom, he was "jumped" and beaten by three perpetrators -- one white man (whose name K. later learned was Gino) and two Hispanic men (one of whom was Munguia). Gino "was doing most of the beating" and the Hispanic men "were holding [K.] down." K. asked Tillman to make them stop. Whenever he tried to speak with her, "she would hit him and tell him to shut up."

The perpetrators dragged K. to the living room and continued to beat him. They retrieved three firearms K. had in the house, including a loaded .357 revolver. Gino had the revolver, and the Hispanic men had the two other firearms. Tillman knew about the revolver because K. had shown it to her "a long time before this had happened." Gino reentered the living room and "constantly" pointed the revolver at K., "pistol whipped" him in the forehead, cut his neck with a knife, and continued beating him while the Hispanic men held him down. Tillman "was sitting there watching it happen." She and the two Hispanic men used a sheet to cover up a window inside the house so nobody could see inside. Tillman also cut the telephone line.

The perpetrators moved K. to a chair in the dining room while they searched through his belongings for four to five hours. Tillman sat on a chair across from K. One of the perpetrators brought K.'s wallet to Tillman, and she took two credit cards out of it.

Eventually, "they" told K. to sit on the couch, and K. complied. Munguia held the rifle "for a little while." About

15 minutes later, "it got real quiet," and K. left for his neighbor's house to call police. On his way out, he noticed his PT Cruiser and red truck were missing.

Sheriff deputies arrived at the house around 5:00 a.m. on December 10. They conducted an in-field showup, where K. identified Tillman as his ex-wife who "assaulted him and kept him in his house" and Munguia as one of the Hispanic men who was in his house who "had assaulted him." Tillman had blood on her hands and Munguia had even more on his hands.

About six weeks after the incident, K. and Tillman resumed their relationship. He visits her while she is incarcerated, puts money on her books, and has paid for her legal defense.

At trial, K. testified to a version of events somewhat favorable to Tillman, including that Tillman did not hit him and did not help in putting up the sheets. He was impeached by contradictory statements he gave to police on the morning of the attack. K. did, however, testify that at no point during the attack did Tillman appear frightened or in fear of her life and it never seemed as though she was being held hostage.

B

Tillman's Defense

Tillman testified on her own behalf. On the night and morning K. was attacked, she was under the influence of methamphetamine. She, Munguia, another Hispanic male, and Gino went to K.'s house to retrieve her belongings. She went in first, K. locked the front door, and she later let the others in. When Tillman was in the bathroom, Gino attacked K. Gino

and one of the Hispanic men dragged defendant to the living room. Gino "seemed to just be in control of everything," and Tillman thought he was the "scariest thing . . . ever." Tillman was frightened and "didn't know what to do." She did not strike or kick K. She did not help hang sheets over a window. She never intended for the perpetrators to beat or attack K.

C

Munguia's Defense

Munguia testified on his own behalf. He, another Hispanic man, Tillman, and Gino went to K.'s house to retrieve Tillman's furniture. Tillman went inside the house by herself, and 5 or 10 minutes later Gino went inside. Thereafter, Munguia heard sounds of struggle. He went inside to investigate and saw Gino hitting K. in the bathroom. Munguia did not know what to do. Gino and the other Hispanic man took K. to the living room and told him that nothing would happen to him if he cooperated. Munguia did not leave the house because he was "confused" and "didn't know what to do." He ended up holding one of the guns and "held it just like they told [him] to because [he] was scared that they would do something against [him]." He never pointed the gun at K. He believed that if he ran, Gino would shoot him. He ended up with K.'s credit cards because Tillman gave them to him. He had K.'s blood on his hands because Gino told him to clean up the blood stains on the carpet.

DISCUSSION

I

Sufficient Evidence Supported Tillman's Conviction For Assault With A Deadly Weapon

Tillman contends there was insufficient evidence to support her conviction for assault with a deadly weapon. Her argument is as follows: she was charged with and found guilty of assaulting K. with a deadly weapon under Penal Code¹ section 245, subdivision (a)(1); that subdivision specifically limits the offense to an assault committed with a deadly weapon "other than a firearm"; the only such act occurred when Gino cut K. on the neck with a knife in the living room; and there was insufficient evidence she aided or abetted that act. As we explain, the pleading error in the information did not preclude the People from proceeding on a theory Tillman was guilty of assault with a deadly weapon, including a firearm, and there was sufficient evidence supporting that conviction on an aiding and abetting theory.

A

Statutory Scheme And Factual Background

Section 245 defines three separate offenses: (1) "assault . . . with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury . . ." (§ 245, subd. (a)(1)); (2) "assault . . . with a

¹ All further section references are to the Penal Code.

firearm . . .” (§ 245, subd. (a)(2)); and (3) “assault . . . with a machinegun . . . or an assault weapon . . . ” (§ 245, subd. (a)(3)).

Tillman was charged with “a violation of Section 245(a)(1) of the Penal Code . . . willfully and unlawfully commit[ting] an assault upon [K.], with a deadly weapon, and by means of force likely to produce great bodily injury.” (Underlining omitted.)

The jury was instructed as follows: “The defendants are charged . . . with assault with a deadly weapon. [¶] To prove that a defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a deadly weapon . . . ; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he or she was aware of facts that would lead a reasonable person to realize that his or her act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, he or she had the present ability to apply force with a deadly weapon to a person. [¶] . . . [¶] A deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury. (Italics omitted.)

The verdict form returned by the jury stated as follows: “We . . . find the Defendant HARRIET TILLMAN, Guilty of the crime of violation of Section 245(a)(1) of the Penal Code of the State of California (Assault with a Deadly Weapon), as charged in . . . the Information.”

B

Use Of The Incorrect Subdivision In

Charging The Assault Was Of No Consequence;

Sufficient Evidence Supported Tillman's Conviction For Assault

With A Deadly Weapon On An Aiding And Abetting Theory

The incorrect statutory reference in charging Tillman was of no consequence. The allegations in the information, the wording of the instruction, and the jury verdict form all informed Tillman and the jury that the charged crime was assault with a deadly weapon, which here included assault with a firearm. (See *People v. Thomas* (1987) 43 Cal.3d 818, 826 [the allegations of the information, rather than a specific statutory reference, determine what offenses are charged]; *People v. Ellis* (1987) 195 Cal.App.3d 334, 339 ["erroneous reference to a statute in a pleading is of no consequence provided the pleading adequately informs the accused of the act [s]he is charged with having committed"].) Moreover, Tillman impliedly consented to have the jury consider whether she was guilty of assault with a deadly weapon, including a firearm, by her failure to object. (*People v. Toro* (1989) 47 Cal.3d 966, 973-978, overruled on other grounds in *People v. Guivan* (1998) 18 Cal.4th 558, 568, fn. 3.) On this record, Tillman's conviction for assault with a deadly weapon can stand, as long as there was sufficient evidence of that crime. There was.

The prosecutor proceeded on a theory that Tillman was guilty of assault with a deadly weapon because she aided and abetted the perpetrators in that crime when they assaulted K.

with firearms. Aiding and abetting liability requires proof the "aider and abettor act[ed] with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

"[A]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.'" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Viewing the evidence in a light most favorable to the verdict, as we must on a sufficiency of evidence review, there was substantial evidence to support Tillman's assault conviction. Tillman let the three perpetrators into the house without K.'s knowledge, even though he had locked the front door. Tillman then used the ruse of needing toilet paper to get K. into the bathroom, where he was jumped by the three perpetrators. Tillman sat on the toilet while the perpetrators "beat the hell out of [him]." The perpetrators then retrieved K.'s three hidden firearms, including a loaded "357" revolver that Gino had and Tillman admitted she knew existed because K. had shown it to her "a long time before" the charged crimes. Gino "constantly" pointed the revolver at K. and in the living room "pistol whipped" K. in the forehead. Munguia held the revolver when K. was in the living room on the couch. Tillman joined Munguia in covering up the windows with sheets so nobody could see inside. K. repeatedly tried to talk with Tillman and every time he did, she would "hit him and tell him to shut up."

On this record, there was sufficient evidence Tillman aided and abetted in the assault with a deadly weapon on K.

II

The Court Did Not Err In Refusing To Instruct

On Grand Theft As A Lesser Included Offense Of Robbery

Defendants contend the court erred in failing to instruct on grand theft, a lesser included offense of robbery. They are wrong.

A trial court must instruct on a lesser included offense when the lesser is supported by "substantial evidence," i.e., evidence from which a reasonable jury could conclude beyond a reasonable doubt the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162; *People v. Mendoza* (2000) 24 Cal.4th 130, 174.) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense." (*Breverman*, at p. 162.)

Here, there was no substantial evidence to warrant a grand theft instruction for either Munguia or Tillman because they cannot show substantial evidence supporting the absence of force or fear, making the robbery only grand theft. (See *People v. DePriest* (2007) 42 Cal.4th 1, 50 [distinction between robbery and grand theft is absence of force of fear].)

In light of his testimony, Munguia contends the jury could have believed he intended to assist Tillman in retrieving her property, "he was caught in a difficult situation, with the heavily armed Gino, insisting on his cooperation in keeping [K.]

at bay," but disbelieved his testimony that he did not intend to take the credit cards. The problem with this theory is Munguia's admission that he held the gun. Under this scenario, either he was guilty of robbery or he was not, based on his duress defense. Contrary to Munguia's argument on appeal, there was no scenario under which the offense would have been only theft.

Tillman contends, "[t]he jury could easily have believed that [she] did not intend to rob [K.], but instead was trying to retrieve her Jeep and some other personal items when she took the men to [K.]'s house and let them in." The jury also could have believed she stole the credit cards from K. but without force or fear, as there was "no evidence at all that [she] personally used any force or fear to take any property from [K.]" She is wrong.

As the People point out, there was evidence Tillman personally used force or fear on K. in the form of K.'s statement to the police that every time K. tried to talk with Tillman, she "would hit him and tell him to shut up." But Tillman is correct the jury could have chosen not to believe this evidence, in light of K.'s trial testimony that Tillman never hit him. However, there was undisputed evidence Gino robbed K., and there was no substantial evidence Tillman did not aid and abet in that crime.

On this record, there was insufficient evidence to support a lesser included instruction as to either defendant on grand theft.

III

The Court Did Not Err In Conducting A Hearing On Aggravating Factors

Defendants contend the court erred by conducting a hearing on aggravating factors without legislative authorization, violating Supreme Court precedent that the middle term is the statutory maximum a judge may impose based solely on the facts either reflected in the jury verdict or admitted by the defendant. (*Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856]). Their argument is based on the premise the prosecutor sought a jury trial on the aggravating factors, there was no procedure for submitting such factors to a jury, and even though defendants waived jury trial for a court trial, there still was no legislatively-authorized procedure for the court to conduct such a trial.

The problem with defendants' argument is simple. By the time of defendants' sentencing hearings on July 6, 2007, the law had been changed in response to *Cunningham*. (Stats. 2007, ch. 3, enacting Sen. Bill No. 40 (2007-2008 Reg. Sess.).) As amended, the law now provides: (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle, or lower term based on

reasons she states. (Pen. Code, § 1170, subd. (b).)² The sentences imposed by the court for both defendants followed these directives.

IV

Tillman Was Entitled To Credit On Her Probation Cases

Tillman contends she was entitled to "reinstatement" of 54 days of presentence credit in case No. 04F07992 and 22 days of presentence credit in case No. 05F05934, after the court found she had violated probation in those cases and sentenced her to prison terms concurrent to the prison terms for robbery and assault. She is correct.

It appears the court here simply overlooked applying the credit in the probation cases when sentencing Tillman to concurrent prison terms. The current probation report documents the time earned in those cases was 54 days in case No. 04F07992 and 22 days in case No. 05F05934. We order the judgment and abstract modified to reflect that credit.

V

Clerical Corrections To Both Defendants'

Abstracts Of Judgment Are Necessary

Tillman contends three corrections to her abstract of judgment are necessary. She is correct. We also order the

² The retroactive application of Senate Bill No. 40 does not violate the proscription against ex post facto laws. (*People v. Sandoval* (2007) 41 Cal.4th 825, 845.)

first two of these corrections made to Munguia's abstract of judgment, as they apply to him as well.

One, the court imposed a court security fee in the amount of \$40 pursuant to section 1465.8. However, the abstracts of judgment incorrectly reflect the following: "Defendant to pay Court Security Fee of \$40.00 per conviction." The abstracts need to be amended to reflect a court security fee of \$20 per conviction, for a total of \$40. (§ 1465.8, subd. (a)(1).)

Two, the court imposed a main jail booking fee of \$208.43 and a main jail classification fee of \$24.09. However, the abstracts of judgment incorrectly reflect a main jail booking fee of \$213.37 and a main jail classification fee of \$23.50. The abstracts need to be amended to reflect a main jail booking fee of \$208.43 and a main jail classification fee of \$24.09.

Three, as to Tillman, the court awarded 660 days of credit in the robbery case (case No. 05F10859). However, the abstract of judgment incorrectly reflects the 660 days were awarded in case No. 07F00182. Tillman's abstract needs to be corrected to reflect the 660 days were awarded in case No. 05F10859.

DISPOSITION

The judgment in Munguia's case is affirmed.

The judgment in Tillman's case is modified to award her 54 days' presentence credit in case No. 04F07992 and 22 days' presentence credit in case No. 05F05934. As modified, the judgment is affirmed.

The clerk of the superior court is directed to prepare an amended abstract of judgment in Tillman's case reflecting:

(1) 54 days' credit in case No. 04F07992 and 22 days' credit in case No. 05F05934; (2) 660 days' credit in case No. 05F10859; (3) a court security fee of \$20 per conviction, for a total of \$40; and (4) a main jail booking fee of \$208.43 and a main jail classification fee of \$24.09.

The clerk of the superior court is directed to prepare an amended abstract of judgment in Munguia's case reflecting:

(1) a court security fee of \$20 per conviction, for a total of \$40; and (2) a main jail booking fee of \$208.43 and a main jail classification fee of \$24.09.

The clerk of the superior court is further directed to transmit these amended abstracts to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.